

EXHIBIT 3

428 Royal Bonnet Court
Fort Myers, FL 33908

February 21, 2019

National Transportation Safety Board
Attn: Ms. Sharon Bryson, Managing Director
490 L'Enfant Plaza, SW
Washington, D.C. 20594

Re. FOIA Request No. FOIA-2018-00338
Accident No. DCA96MA070
Appeal From Response to Request dated November 26, 2018

Dear Ms. Bryson:

This letter contains my appeal of the National Transportation Board's (the NTSB's, the agency's or the Board's) denial of Request No. 1 of my Request under the Freedom of Information Act (FOIA), 5 U.S.C. Section 552(a)(6)(A)(ii).

A copy of my request (the "Request") is attached as Exhibit A. A copy of the NTSB's denial of that request ("Response" or "Denial") is attached as Exhibit B.

With regard to item 1 of my Request, Ms. Moyer states that she determined that "a few other documents, which total 332 pages, are exempt from the FOIA."

On December 7, 2018, the day after I received Ms. Moyer's Response, I wrote to Ms. Tamara Crawford of your FOIA Requester Service Center stating in part that:

In her Response to my Request No. 1, Ms. Moyer states that she determined that "a few other documents, which total 332 pages, are exempt from the FOIA under . . . (Exemption 5) which exempts from disclosure "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency . . . " and that it also "exempts . . . any agency records that are preliminary and deliberative."

" . . . Could you please tell me the nature of the [documents contained in the 332 pages which the agency claims are exempt under Exemption 5] (such as intra-office memoranda, correspondence between the NTSB and the University of Southampton [the "University"] regarding [subject], or report from the University re results of tests it conducted. As you can imagine, it is virtually impossible to make intelligent decisions about the course of action I will take . . . without this kind of information. (Emphasis added)

A copy of my December 7, 2018 letter is attached hereto as Exhibit C.

Ms. Moye's Response also states that "many of the documents responsive to your request under the FOIA involve documents and records that are included in . . . our public record."

Because of the agency's delay of over two months, it was not until February 14, 2019, that I received the information I needed to check the public record (or "public docket").

Among the documents in the public docket, was a letter from then chairman of the NTSB, Jim Hall to the Chairman of the U.S. House Committee on Transportation and Infrastructure, Bud Shuster. In that letter, Chairman Hall responded to Mr. Shuster's question about the cockpit voice recorder tape:

1. Last year it was reported that there was an unidentified sound at the end of the cockpit voice recorder tape. Has that sound been identified?

Response: at the end of the cockpit voice recorder (CVR) tape there is an abrupt, short duration noise that has not been identified. The sound has been compared to other sounds provided from CVR tapes that the Safety Board has collected from various accidents and incidents. The sound does not match any previously identified signatures, including bomb explosions. We have been conducting tests in the United Kingdom involving explosives on a retired Boeing 747 during which we are recording sounds to hopefully better understand the sound on the TWA 800 CVR tape. Further, the Safety Board continues to conduct a series of tests to determine the events that may have led to the accident. In each of the planned tests using a Boeing 747, sound data will be collected that might eventually help to identify the sound on the TWA flight 800 CVR tape. (Emphasis added)

Not only did Chairman Hall's letter confirm the reports I had read about the CVR tape and the test or tests conducted on that tape, it convinced me that at least some of the documents related to the test(s) were not exempt under Exemption 5. A copy of Chairman Hall's letter is attached as Exhibit D.

On February 14th, after reading this letter, I wrote to Ms. Crawford, asking her:

Can you tell me whether you have any documents relating to the "tests in the United Kingdom . . . during which we are recording sounds to hopefully better understand the sound on the TWA 800 CVR tape . . ." which is referred to in Chairman Hall's August 20, 1997 response to Congressman Shuster's July 16, 1997 letter? Could you give me a link to them? (Emphasis added)

A copy of my February 14th letter to Ms. Crawford is attached as Exhibit E.

Ms. Crawford responded on February 20th stating in part that:

In our letter dated November 26, 2018, we denied documents under exemption (b)(5) which exempts from disclosure "inter-agency or intra-agency

memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency. . . . Exemption 5 exempts from disclosure agency records that are preliminary and deliberative. . . . Pursuant to this exemption, we withheld draft correspondence, preliminary and analytical information.

A copy of Ms. Crawford's letter is attached as Exhibit F. She does not identify the documents the Board claims contain "draft correspondence" or "preliminary and analytical information" nor does she explain why the Board is not producing the documents that don't.

In any event, Ms. Crawford misses the point. Although I did ask her to send me a link, my letter primarily asked her not to produce documents but to identify them—not to tell me what the documents said but what they were—their identity, not their contents. I am not now contesting the Board's statement of the law, I am only trying to find out what the documents are so I can determine whether they meet the law's requirements.

Obviously, I would like to have the NTSB produce the documents I have requested, but I am not now asking the agency to do so. That may come later. Right now, I am only asking the agency to identify documents.


Specifically, I request that the Board:

1. Identify each of the documents included in the 332 pages that it claims are exempt under Exemption 5, state how many pages long it is; and state the reason the Board believes it is covered by Exemption 5;
2. Identify each document relating to the tests on the CVR tape which are mentioned in Chairman Hall's letter to Representative Shuster and, if applicable, the reason it is claimed to be exempt; and
3. To the extent they exist, identify all other document requested in my Request No. 1 and, if applicable, the reason each is claimed to be exempt.

I have not appealed from the Board's Decision relating to my Request No. 2 because the agency says it has not located them. I assume that this means that the agency does not have, or have access to, the requested documents. If I am wrong or if you do locate such documents, please let me know and consider this appeal to apply to my Request No.2 as well.

I have not yet decided whether I will use the mediation services of the OGIS but I will inform Ms. Crawford if I do.

Sincerely,


Timothy C. Klenk